SUPREME COURT, U. S.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ANGELO MASCIA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Angelo Mascia prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case, entered on September 8, 1971, which affirmed his conviction.

Opinions Below

The United States Court of Appeals for the Second Circuit unanimously affirmed a judgment of conviction entered again Angelo Mascia in the United States District Court for the Southern District of New York. A copy of the unreported opinion of the Court of Appeals is annexed

marked Appendix A. The Opinion of Hon. Edmund L. Palmieri, U.S.D.J., denying a motion for acquittal notwithstanding the verdict is annexed marked Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 8, 1971. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

Questions Presented

1. Have *Sherman* v. *United States,* 356 U.S. 369 (1958) and *Sorrells* v. *United States,* 287 U.S. 435 (1932) been erroneously interpreted by the Courts below to place beyond judicial scrutiny the offensive and unconscionable conduct of the Internal Revenue Service in aiding, encouraging, and joining in the activities of a corrupt tax adviser in his endeavor to extort money from his client-taxpayer, Angelo Mascia, which resulted in the latter's indictment for bribery?

2. Did the Trial Court, which was deeply offended by the IRS conduct but felt powerless to dismiss the indictment, in fact have the power to do so?

3. Should the Trial Court have dismissed the indictment on the ground of entrapment where the Internal Revenue Service initiated the payment of the bribe and the prosecution failed to offer sufficient proof that Mascia was predisposed to pay a bribe?

The Charges

Angelo Mascia was convicted of bribery, Title 18 U.S.C. § 201, and conspiracy to bribe, Title 18 U.S.C. § 371, rendered by a jury on November 16, 1970. On January 26,

1971, Hon. Edmund L. Palmieri imposed a sentence of one year on each count to run concurrently and a $5,000 committed fine on each count.

Count One alleged a conspiracy by Mascia, his son John, and one William Williams, to bribe an IRS agent, Lawrence Ruggiero, in connection with the latter's audit of the Mascia personal tax returns and those of their company, Alang Metal Co. Count Two charged a $1,500 bribe payment, and Count Three charged the same payment as a gratuity. William Williams was severed as a defendant and did not testify. The charges against John Mascia were dismissed for failure of proof at the close of the case. The jury acquitted Angelo Mascia on the gratuity count.

REASONS FOR GRANTING THE WRIT

POINT I

The courts below misconstrued decisions of this Court as putting beyond judicial scrutiny offensive conduct of the Internal Revenue Service otherwise requiring a dismissal.

Throughout the trial, the Trial Court evidenced its grave concern at the conduct of the IRS in aiding and encouraging William Williams, a known corrupt tax adviser and actually the subject of their investigation, in his efforts to coerce a bribe from his own client Mascia, an unlettered and untutored taxpayer (348)* who obviously was relying on the faithless Williams to fairly represent him before the IRS. The IRS was fully aware that Williams and the agent were to split any money so obtained, and they in fact did divide the proceeds between them. After the agent gave his testimony, the Trial Court said that if it were the jury it would acquit Mascia (351), and after

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* References are to page numbers of the appendix in the Court of Appeals.

the verdict, the Trial Court stated that if it had the power, it would direct an acquittal, notwithstanding the verdict (547). The Trial Court further equated the IRS' conduct to that of the corruption of a defense attorney and stated (537, 547):

> If I had the authority to do so, I would find that any government conduct causally related to a conviction which involves the corruption of a defense counsel or a person acting in a confidential capacity to a defendant should be condemned and that no conviction resulting therefrom should be upheld.

It is submitted that the first reason for granting this Writ is that on the facts detailed hereafter, the Trial Court and the Court of Appeals misconstrued *Sherman* v. *United States, supra,* and *Sorrells* v. *United States, supra,* and did in fact have the power to dismiss the indictment where the police conduct offended traditional standards of fairness. The second reason is that in reluctantly reaching its conclusion, the Trial Court declined to follow authorities seemingly in conflict with *Sherman* and *Sorrells* which would have authorized a dismissal, and therefore to resolve the apparent conflict of authority applicable to the unconscionable IRS conduct in this case, this Court should grant Petitioner's Writ.*

The Facts

The government's principal witness on the trial was Lawrence Ruggiero, an IRS undercover agent in an investigation of the corrupt tax consultant, William Williams, the latter being, as the government conceded, as "corrupt" a man as could be found (397). Williams had been

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* Based on *Sherman* and *Sorrells* the Trial Court declined to charge that the jury could acquit based on the offensiveness of IRS' conduct (538).

with the IRS for many years and after leaving the Service became a tax representative mainly for residents of Westchester County, of whom Angelo Mascia was one (54). However, as the IRS well knew, Williams' sole efforts were directed toward extorting money for himself from his various taxpayer-clients by means of inducing them to believe that they were in trouble with the IRS and that a bribe to a complaisant agent would end the "trouble". Williams and Ruggiero in this, as in other cases, agreed to split any money so obtained (53). The IRS knew this was going on (53, 71-3, 282-8) and lent its support, encouragement and assistance to this scheme. Ruggiero concededly played the part of an extorting tax agent to the hilt (399), and in the words of the Trial Court, "did everything to frighten this taxpayer . . ." (544).

To this end, agent Ruggiero was assigned to audit the tax returns of Angelo Mascia, his son, John Mascia, their company, Alang Metal Co., and other members of the Mascia family. Ruggiero conducted three meetings in 1969 with Angelo Mascia at Mascia's home in Yonkers. On February 28, Denby, Mascia's accountant, was also present. At the second meeting on September 3, Ruggiero and Mascia were alone, and on the final meeting, September 18, Williams was also present. Tape recordings were made of these meetings, as well as of other meetings between Williams and Ruggiero alone held in preparation for the subsequent meetings with Angelo Mascia. In fact, the plotting of Williams and Ruggiero was so thick that from November 1968 to January 1970, they spoke approximately two times a week (53-4) and not only about Mascia, but about other clients of Williams who were the subjects of their extortive demands. These recordings with the full knowledge of IRS (282-8, 53, 71-3) reveal word-for-word that Ruggiero and Williams conspired to threaten Mascia with continued harassment, economic ruin and jail in an effort to get him to pay money they planned to divide between themselves. Ruggiero, whether

with Williams or alone, provided the "club" of the IRS and then touted the faithless Williams as the one man who could help Mascia. On the other hand, Williams, while similarly threatening Mascia, encouraged Mascia to rely on Ruggiero who, he said, was a "nice guy" (Ex. 19, p. 42).

It is undisputed that it was Williams and Ruggiero who initiated all talk of the payment of money and that Mascia resisted their pressure,* all the while protesting that he had nothing to hide and would cooperate in any way possible. The jury found that finally, after three long grueling sessions, toward the end of the long meeting of September 18, Mascia paid money to Williams out of Ruggiero's presence, which was thereafter divided between Williams and Ruggiero while they discussed further extortion of other taxpayers represented by Williams.

In persuasive detail, the facts are as follows. First Ruggiero met with Williams on January 2, 1969 for an hour in a Yonkers restaurant where they conspired to extort money from Mascia (205-6). The following exchange starkly concluded and summarized their conversation.**

> Williams: The thing is that could be a gold mine there.
>
> Ruggiero: I know.
>
> Williams: We're not going to close this thing in a week, we're not going to close this case in a week now (210-12).

Pursuant to their scheme, Ruggiero set up a meeting with Angelo Mascia and his accountant, Denby, at Mas-

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* The government in its brief in the Court below conceded that IRS was responsible for initiating the bribe discussions and that the persuasion was "substantial" (p. 13).

** The various transcripts as to these conversations are often devoid of punctuation and have occasional minor typographical errors. They are quoted here exactly as they appear in the record.

cia's home on February 28, 1969, where during a two hour meeting he started the pressure by, among other things, demanding some papers Mascia didn't have (58-9) which he acknowledged later he really didn't want (262). But, nothing happened. Neither a payment nor even an overture of a payment was made to him.

Ruggiero and Williams continued their plotting at their twice-a-week meetings (53, 215, 333), and then Ruggiero met alone with Masica on September 3, 1969, at Mascia's home in Yonkers. Early in the meeting the agent started right off with what was to become his principal threat to Mascia: an interminable harassing investigation that would duplicate and even extend the harassment of a prior agent, Douglas Powell, who according to Mascia had ruined his business.

> Ruggiero: I know there are a million things we have asked you.
>
> . . . you see, the thing it's hard but these what these guys do you've got a guy who comes in here, and the guy starts like you said here, he goes there, he goes here, and he starts looking, and looking, and the guy even if he wants to stop the case he wants to close the case he wants to stop or he wants to cover it up right at that point, it's hard. I mean this guy stirred up mud. (215-7).

Ruggiero threatened Mascia with investigating "fourteen million addresses" bearing Mascia's name (217), with his being "shafted" (229-32), being "buried" (232), going to jail for the "dime that's missing" (232, 235-7), with an investigation that would "take [Ruggiero] fourteen million years . . .", and was "potentially dangerous . . .", "it would be like an octupus . . . chop, chop, chop . . .", it would involve "a million other things", an investigation that "frightens you", that "just mushroom and mushroom", and that might discover "skeletons in the closet" (220-1, 237).

As the solution for all the threatened harassment, Ruggiero proposed Williams, as a trusted adviser who "knew his way" around the IRS which would be to Mascia's advantage (223-4), made a veiled statement that a payment could end his troubles (235) and suggested that it would be nice for Mascia to have everything behind him (238-9).

Notwithstanding all the foregoing, to the very end of the long second meeting Mascia continued to protest that he had done nothing wrong and offered his cooperation on obtaining further information if the IRS wanted it (239).

Ruggiero acknowledged that Mascia made no payment to him, nor even any overture of payment, at any time during the two hours of this second meeting (240).

Seven days later on September 10, 1969, agent Ruggiero and Williams met in a restaurant in Yonkers for about an hour to plan their next attack on Mascia. It is clear they knew there was no basis for Mascia to want to pay a bribe, and their scheming was illustrated by Williams' suggestion that at their next meeting with Mascia he would threaten him with IRS collateral investigations in Florida and Connecticut.

> Williams: Collaterals in Florida and Connecticut. Now what's the best way to handle it. Do we give him an indication?
>
> Ruggiero: How much do you have to shake this guy?
>
> Williams: I don't know. I don't know. . . . That's why I was thinking along the lines that if you ask me, . . . ask me an inocuous question which is loaded which will shake the s--- out of him and won't mean anything to anybody else except him. You know what I mean? What about the XYZ Company in Conn. or what about the property that you purchased or whatever the hell it is in Florida.

Ruggiero: All right.

Williams: You know what I mean, so that he knows that you know something.

Ruggiero: Yeah.

Williams: He don't know how much

Ruggiero: Yeah,

Williams: It's going to scare the s--- out of him.

Ruggiero: Yeah.

Williams: And afterwards, I'll say to him, what the hell are you doing holding out on me. What is this thing that Ruggiero is talking about? For Christ's sake, what's he got here, you know.

Ruggiero: Yeah.

Williams: I'd back him up against the wall then.

Ruggiero: All right, all right. I'll do that I'll see if I can [get anything] (242-7).

The two of them then discussed going up to Connecticut and checking the records on some property there that belonged to an "Angelo Mascia". They decided that Williams would sign any papers in the County Clerk's office so Ruggiero's name would not appear. They agreed that even if it wasn't the same Angelo Mascia [it wasn't (251)] that owned the property there that didn't matter; they would still threaten him with it in some way. Absent this they knew they had nothing (258-9).

A meeting between Williams and Ruggiero and Angelo Mascia and his son John was arranged for September 18, 1969. Williams picked up Ruggiero in his car and they drove together to that meeting. On the way they had a last-minute discussion and rehearsal of what could be used to try to pressure Mascia to pay some money (181-3, 192-4).

Williams: What the hell have we got here, now, this guy will spring for something. The question is do we have anything Larry, or what, tell me? (181, 183).

And later,

> Ruggiero: Suggest something to me (191).

Williams complained they hadn't gotten any money out of Mascia yet and reminded Ruggiero of the deal to split anything they might get.

> Williams: I don't know what the hell—I don't know whether I will be able to get anything out of this or not, or whether you are—whatever you want, add a little bit to it, you know, grab a bite for myself out of it—I wasted a lot of time with this c---s-----. [*]
>
> I haven't got five cents yet.

Upon arriving, they started right in on Mascia with their threats and veiled demands for a bribe.

> Williams: You've been through so Goddamn much and everything else . . . and I trust Larry a hundred percent. He's a goomba and there's no f------ around you know what I mean? Larry is at the crossroads right now. He can either get rid of this thing or he can start collateral investigation.
>
> . . .
>
> He has certain information the leads we don't know what the leads are or where they're going to go or what they're going to turn up.
>
> . . .
>
> We are putting it right on the table you know. Ah, this is the goddamned I know that you've been hounded and harassed. This is not our fault. (Ex. 19, pp. 11-12).

Throughout the meeting either Ruggiero or Williams would again and again obliquely bring up the subject of

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* This was Williams referring to his own client with whom the prosecution charged *he* was conspiring to bribe Ruggiero.

bribery, Ruggiero saying the audit would soon be out of his hands (Ex. 19, p. 16), and once these things start it's like a "steam roller" and can cause a lot of aggravation (Ex. 19, p. 58), and Williams saying things better be closed out because new IRS agents were going to come in from out of town (Ex. 19, p. 61). Mascia's angry response was:

> It don't bother me. Let them indict. They can do any f------ thing they want to do. . . .
>
> . . .
>
> You understand what I mean I'm not gonna put up with this f------ s--- this has been going on for years now.
>
> Downtown uptown midtown, meet this guy meet the other guy.
>
> . . .
>
> And I'm gonna give it up I'm going to tell them to go f--- themselves and say . . . because, you know I can stand on my constitutional rights, too. Make . . . them got anything on me? (bangs on the table) indict!

But Williams and Ruggiero kept pushing the subject.

> Williams: Larry, there are only four of us here at the present moment. Two of them are related and I think they're all right, as far as I know they're all right. Now let me ask you one question.
>
> Ruggiero: What's that. (Ex. 19, p. 48.)

Williams thereupon asked Ruggiero if he could close *all the cases* out without making any collateral investigations or doing anything. And later on:

> All right now you [Ruggiero] can write this thing off. (Ex. 19, p. 50).

. . .

> I'll handle the golf balls once we get an indication (Ex. 19, p. 51).

Obviously, *there had been no indication of any kind up to this point* which was over halfway through the third two hour meeting that Mascia was willing to pay any bribe to anyone. On the contrary Mascia continued to offer any information they wanted (Ex. 19, pp. 23-4). But Williams kept at it.

> Well look there's only four of us here for Christ's sake I think we're . . . (Ex. 19, p. 51).

But still no bribe was forthcoming, and after considerable talk on unrelated subjects Williams got impatient with the "progress" of his extortion and continued his dialogue with Ruggiero: "now how many golf balls do we need to play a game? This is what I want to know . . . (Ex. 19, p. 59)."

> Ruggiero: Well, I no, no, I see what you mean. No well listen as far as the ah as far as that's concerned ah whichever whichever is up to you I would leave it up to you you know ah.
>
> Williams: . . . I want to close the f---- thing I would like to close it out today if I could.
>
> Ruggiero: Then we'll close it today. You want to close it today? We'll close it today.
>
> Williams: Yeah get the god dammed thing out of the way.

And Mascia who had said nothing through all of this finally knuckled under to his supposed "tax advisor" saying: "Well that's it then" (Ex. 19, p. 65), although he thereafter protested that it wasn't right and he had never done anything like that before (Ex. 19, p. 66).

Mascia asked Williams to go in the other room and talk with him, simultaneously, according to Ruggiero's testi-

mony, taking a roll of bills from a dresser drawer. Williams and Mascia were in the other room for some minutes and Williams was the first to emerge whispering to Ruggiero "$2,000?" to which Ruggiero agreed (Ex. 19, p. 66-7).

The government argued and the jury, by its verdict, found that in that back room Mascia gave $1,000 to Williams which Williams gave to Ruggiero in the ride away from the house. It was Ruggiero's testimony that the following day Williams came to him with an envelope with another $1,000 of which Williams, with Ruggiero's consent, kept $500 as his share of the money (97).

The Trial Judge felt that *Sherman* v. *United States,* 356 U.S. 369 (1958) and *Sorrells* v. *United States,* 287 U.S. 435 (1932) rendered him impotent to dismiss notwithstanding the foregoing facts, and the Court of Appeals citing these precedents declined to even examine IRS' conduct. It is submitted this was error. *Sorrells* and *Sherman* do not compel this result, and subsequent cases construing these two opinions have so held. But to the extent that *Sorrells* and *Sherman* can be read to place police conduct beyond judicial scrutiny, Petitioner submits they should be limited or overruled.

A close reading of *Sorrells* shows that the issue was solely whether the evidence warranted submission of entrapment to the jury. The issue of whether or not particularly offensive police conduct could give rise to a judicial determination of entrapment as a matter of law was not before the Court. In *Sherman,* the Court reversed the conviction on the ground, although not acknowledged as such, the government's conduct was outrageous in inducing a former addict to return to dealing in narcotics. Chief Justice Warren, writing for the majority, declined to reassess the doctrine of entrapment on two grounds: that the majority in *Sorrells* declined to make entrapment generally cognizable solely by the court and because the parties

had not raised the issue. He then analyzed Mr. Justice Robert's minority opinion in *Sorrells* at pp. 376-77 as follows:

> Mr. Justice Roberts asserted that although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by showing defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents. . . . Furthermore, it was the position of Mr. Justice Roberts that the factual issue of entrapment—now limited to the question of what the government agents did—should be decided by the judge, and not the jury.

Thus, *Sorrells* and *Sherman* stand only for the proposition that entrapment is not exclusively for the Court. The reverse is therefore also true: entrapment may be taken from the jury and determined by the Court where the facts warrant it. Obviously, there must be a point beyond which police conduct may not go, even in the presence of some predisposition, if reasonably decent standards are to be maintained for police conduct.

Perhaps the leading case in the Second Circuit supporting the rule that it is the Court's function in the first instance to determine whether or not the conduct of the government meets the minimum required standards is *United States* v. *Morrison,* 348 F.2d 1003 (2nd Cir. 1965), cert. denied, 382 U.S. 905 (1965), where the Court stated at page 1004:

> . . . a recent reassessment of the entrapment offense has led two Courts of Appeals to inquire, alternatively, whether, in exposing the defendant's criminality, the government agents have acted in an offensive manner or lived up to reasonably decent civilized standards for the proper use of government power.
>
> . . .

> We take this opportunity to restate what was implicit in our former decision [*Pugliese*]: assuming that the government has initiated or set in motion the acts of the defendant, the entrapment offense probes not only the predisposition of the defendant to commit the crime with which he is charged, but, alternatively, the conduct of the government in promoting the commission of the crime.

Morrison cited *Whiting* v. *United States,* 321 F. 2d 72 (1st Cir.), cert denied, 375 U.S. 884 (1963) and *Accardi* v. *United States,* 257 F. 2d 168 (5th Cir.), cert. denied, 358 U.S. 883 (1958) in support of the Court's mandate.

The First Circuit in *Whiting* indicated that the Court was best equipped to deal with the question of the appropriateness of the government's conduct. At page 76 the Court stated:

> . . . once government inducement has been shown there are two issues. The government should establish that it engaged in no conduct that was shocking or offensive per se,[8] and that the defendant was not, in fact, corrupted by the inducement.

In said footnote 8 the Court stated:

> Conceivably this divisible question should be for the Court. Cf. *Sherman* v. *United States,* 356 U.S. 369, 384-5.

In *United States* v. *Smalls,* 363 F. 2d 417, 420 (2nd Cir. 1966), cert. denied, 385 U.S. 1027 (1967), the Second Circuit again recognized that government conduct should be evaluated by the Court, stating:

> . . . it is true that there have been suggestions in some cases since *Sorrells* and *Sherman* that where the actions of the government 'shock the conscience of the Court' a conviction cannot be allowed.

To the same effect see *United States* v. *Dillet*, 265 F. Supp 980 (S.D.N.Y. 1966) and *United States* v. *Chisum*, 312 F. Supp 1307 (D.C. Cal. 1970).

See also *United States* v. *Viviano*, 437 F. 2d 295 (2nd Cir. 1971) and *Kadis* v. *United States*, 373 F. 2d 370 (1st Cir. 1967) where the Courts take the position that the government's conduct should not be examined in absolute terms, but rather in relation to defendant's predisposition to commit the crime. Thus, the greater the offensiveness of the government's conduct, the greater must be the predisposition proved by the prosecution, otherwise as a matter of law, the Court will decide there was entrapment and direct an acquittal.

It is submitted that whether in this case IRS's conduct is examined with or without regard to evidence of predisposition matters not at all because the government's conduct was so socially offensive and the absence of predisposition so clear (see Point II, *infra*), that under either view, the Courts below should have ruled that entrapment existed as a matter of law and directed an acquittal. Wherefore this petition should be granted.

POINT II

The courts below permitted a finding of predisposition contrary to the facts and law.

The government conceded on the record that for purposes of Mascia's defense of entrapment, Williams was a government agent (309), and in its Brief in the Court below it also conceded that Williams and agent Ruggiero were responsible for initiating the alleged payment and applied "substantial" persuasion to effect it (p. 13). Thus, under this theory of submission, the only issue for the jury was whether there was evidence from which it could conclude beyond a reasonable doubt that Mascia was predisposed to pay a bribe. *United States* v. *Henry*, 417 F. 2d 267

(2nd Cir. 1969), cert. denied, 397 U.S. 953 (1970); *United States* v. *Riley*, 363 F. 2d 955 (2nd Cir. 1966).

From a detailed analysis of the record it is submitted that there was no basis for the jury's finding that Mascia was predisposed to pay a bribe on September 18, 1969. Under such circumstances the issue of entrapment was for the Trial Court and it is submitted the Court should have directed a verdict of acquittal. *Sherman* v. *United States*, 356 U.S. 369 (1958); *Henderson* v. *United States*, 261 F. 2d 909 (5th Cir. 1958); *United States* v. *Klosterman*, 248 F. 2d 191 (3rd Cir. 1957); *United States* v. *Dillet*, 265 F. Supp. 980 (S.D.N.Y. 1966); *United States* v. *Campbell*, 235 F. Supp. 190 (E.D.N.Y. 1964).

Judge Learned Hand in *Sherman* v. *United States*, 200 F. 2d 880, 882 (2nd Cir. 1952) stated the evidentiary criteria for determining a defendant's predisposition as follows: (1) whether there was any preparation for the payment of the bribe; or (2) whether there was ready complaisance with the suggestion of an illegal payment; or (3) whether the defendant had on some prior occasion committed a prior similar act, here, paid a bribe See also *United States* v. *Sawyer*, 210 F. 2d 169 (3rd Cir. 1954) and *United States* v. *Becker*, 62 F. 2d 1007, 1008 (2nd Cir. 1933).

The government made no real contention that there was any "preparation" or "ready complaisance," and it is submitted that the government also failed to prove a "prior similar act" with evidence sufficient to permit the jury to find beyond a reasonable doubt that Mascia was predisposed to pay a bribe.

On this issue of predisposition by reason of "prior similar acts", the prosecution relied on certain statements by Mascia referring to Internal Revenue Service questioning of Tommy Milo in Connecticut concerning a business there in which Milo and he were partners. On September 3 (69) and September 18 (81) Mascia said he thought the question of any resulting tax liability had been straightened

out and disposed of (Ex. 19, pp. 34, 37, 51), but acknowledged that it might be a problem since only Milo's interest had been straightened out (85-6, Ex. 19, p. 52).*

After Mascia purportedly made the payment to Williams, he repeated that he had *heard*** that the Connecticut business transaction had been straightened out by Milo with the agent in Connecticut, that a deal had been made (94, Ex. 19, p. 77). The Trial Court did not believe that this was proof from which a jury could conclude that Milo had paid a bribe in Connecticut (426-8) but the Court of Appeals felt otherwise and relied on this fact in affirming. There was no contention at any time in any *Court* that Mascia had ever paid a bribe before (426-8).***

The law imposes on the government a strict interpretation of a prior similar act. For example, in *Sherman* v. *United States*, 356 U.S. 369 (1958), a narcotics prosecution, a 9 years earlier sale conviction, and a 5 years earlier possession conviction, were not sufficient prior similar acts to prove predisposition to sell narcotics.

The Court of Appeals, in affirming, relied on two other statements by Mascia at the third meeting to allegedly show a predisposition to pay a bribe: 1) that he would "rob and steal" (39); and 2) that he would not pay taxes in the future but instead would file for $25,000 if he spent $20,000 (Ex. 19, p. 73). "Rob and steal" in the full context used by Mascia was nothing more than a mild joke in what had become for him a trying situation. After being

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* Both Ruggiero and Williams knew that the Milo matter did not amount to anything. Even in their desperate searches for subjects to threaten and stagger Mascia with, it was never mentioned (see pp. 8-10, *supra*) and Ruggiero admitted that he knew that Williams was looking for something (183) and that he just didn't have anything (188).

** The prosecution acknowledged in colloquy that the "deal", whatever that meant (426-8), "was made by Milo" not by Mascia (427).

*** Significant to this point, as well as the entire case, was the absence of any proffer by the government of any allegedly fraudulent tax return of any of the Mascias or any company (371).

pressed as to how he earned his living by Ruggiero and Williams, Mascia said ". . . Wherever I can rob. Put it that way. Wherever I can steal it." No one took him seriously although Ruggiero and Williams were desperately trying to get something on him to coerce a bribe (see pp. 9, 10, *supra*). Ruggiero's bland response was "Well you see what he's trying to say is that there (sic) gonna find out where you got it." (Ex. 19, p. 39). Similarly, *after the payment was made,* Mascia, in obvious anger and frustration, said he would not pay taxes *in the future.* It is submitted that even accepting this as a revelation of a criminal state of mind, rather than the anger of an extortion victim, no case or theory of law supports the proposition that this amounts to proof of a *prior* similar act evincing a *predisposition* to pay a *bribe.* The law is clear that even the commission of an unrelated crime is not evidence of a predisposition to commit another crime. See for example, *Sherman* v. *United States,* 356 U.S. 369 (1958) and *United States* v. *Viviano,* 437 F. 2d 295 (2nd Cir. 1971).

It is therefore submitted that because there was insufficient evidence of Mascia's predisposition to pay a bribe and concededly the government initiated the payment, there was entrapment as a matter of law and the Court below should have reversed and directed an acquittal.

CONCLUSION

For all the foregoing reasons, it is submitted, the Writ of Certiorari should be granted.

Dated: New York, New York, October 7, 1971.

Respectfully submitted,

RICHARD OWEN,
Attorney for Petitioner,
60 East 42nd Street,
New York, N. Y. 10017.

Of Counsel:
RICHARD OWEN,
MORTON J. TURCHIN.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 989—September Term, 1970.

(Argued June 11, 1971 Decided September 8, 1971.)

Docket No. 71-1278

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO MASCIA,

Defendant-Appellant.

Before:

FRIENDLY, *Chief Judge,*

HAYS and OAKES, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* convicting appellant after a jury trial of paying and conspiracy to pay a bribe to an agent of the Internal Revenue Service in violation of 18 U.S.C. §§ 201 and 371 (1964).

Affirmed.

Appendix A.

RICHARD OWEN, New York, N. Y. (Owen & Turchin, New York, N. Y., on the brief), *for Appellant.*

EDWARD M. SHAW, Assistant United States Attorney (Jack Kaplan, Assistant United States Attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, on the brief), *for Appellee.*

HAYS, *Circuit Judge:*

This is an appeal from a judgment entered in the United States District Court for the Southern District of New York after a jury trial convicting appellant of paying and conspiracy to pay a bribe to an agent of the Internal Revenue Service in violation of 18 U.S.C. §§ 201 and 371 (1964). The court imposed concurrent sentences of one year and fines of $5000 for each count. We affirm.

In early 1968, the Internal Revenue Service assigned Agent Lawrence Ruggiero to conduct audits of the federal income tax returns of appellant Angelo Mascia, his son John Mascia, and their partnership Alang Metal Company. Later in the same year Ruggiero undertook an assignment as an undercover agent for the IRS Inspection Service in connection with its investigation of William Williams, a corrupt Westchester accountant who was formerly with the IRS. Williams was engaged by the appellant to represent him in connection with IRS audits of his returns. Agent Ruggiero was instructed to pretend to be willing to accept a bribe from Mascia. He regularly reported to the IRS all his conversations with Williams and Mascia.

Williams told Ruggiero that the audits of the Mascias were a potential "gold mine." Expecting to share in the "take," he urged Ruggiero to seek a bribe.

Ruggiero met with appellant Mascia three times. The first meeting of February 28, 1969 was apparently routine. A second meeting took place on September 3, 1969. Williams was not present. The conversation at this meeting is recorded on tape. Mascia complained that in a previous investigation Special Agent Douglas Powell had harassed Mascia and others. Ruggiero stated that Powell had "stirred up mud" and indicated that his own audit would be lengthy and thorough. Mascia protested that he had nothing whatsoever to fear from such an investigation. Ruggiero told Mascia that he could have avoided trouble with Powell had he been represented by Williams. He said that Williams was familiar with "what is going on inside the Internal Revenue Service" and "knows his way around." Ruggiero said that it was a shame how many people get "shafted by guys like Powell," lose their business, and even go to jail. Mascia ended by telling Ruggiero that the IRS could "take anything you want, take the house, take the apartment, take anything you want to take."

The last meeting, also on tape, took place on September 18, 1969 with Ruggiero, Williams, appellant, and his son John Mascia present. Williams, pursuant to a scheme to threaten Mascia with collateral examinations, opened this meeting by telling him that Ruggiero either could "get rid of this thing or he can start collateral investigation" in Connecticut and Florida. Mascia at first indicated that he would give any information requested. Ruggiero, in order to indicate his willingness to accept a bribe, replied, "Because when they start. OK? It's out of my hands." Ruggiero and Williams proceeded to ask questions concerning Mascia's brokerage accounts, sources of income, sale of a partnership, rental income in New York, and several other

items. To this appellant remarked, "They can assess me anything they want." Soon, however, Williams brought the conversation to a head by asking whether Ruggiero could close out the Mascia audits. Ruggiero indicated that he could end the investigation immediately. When Williams asked "Now how many golf balls do we need to play a game?", appellant asked his son John to leave the meeting. Further conversation between Williams and Ruggiero indicated that Ruggiero could arrange for the investigation to be dropped. Appellant interrupted to say, "I'm not accustomed to doing things the way we're doin' 'em . . ." and "[T]his is the first time I would ever do anything like this . . . ." At this point appellant removed a roll of currency from a bureau drawer and took Williams aside to another room. Upon their return, Williams whispered "two thousand dollars" to Ruggiero. After leaving the Mascia's home, Williams delivered $1000 to Ruggiero, and the next day he gave him an additional $500, having kept $500 for himself.

Appellant contends that the proof of predisposition to pay a bribe was insufficient to justify submission of the case to the jury and that the trial court should have found entrapment and directed a verdict of acquittal. We do not agree. Although the evidence as to the appellant's state of mind was conflicting, there was sufficient evidence to support the jury's conclusion that appellant Mascia was ready and willing to bribe Agent Ruggiero and that his posture of innocence was play acting. For example, the jury had before it on the tape of the September 18 meeting appellant Mascia's statement that "If I spend twenty I file for twenty-five." On the basis of such evidence it could properly have concluded that if Mascia boasted of being prepared to falsify his income tax returns he might also be willing to bribe a revenue agent. See *United States* v. *Sherman,* 200 F.2d 880, 882 (2d Cir. 1952), aff'd after remand in 240

F.2d 949 (2d Cir. 1957), rev'd on other grounds, 356 U.S. 369 (1958); *United States* v. *Becker,* 62 F.2d 1007, 1008-9 (2d Cir. 1933); see also *United States* v. *Viviano,* 437 F.2d 295, ftn. 3 at 299 (2d Cir. 1971).

At another point the appellant said, "I'm in the street .... Wherever I can rob. Put it that way. Wherever I can steal it." Although appellant contends that he was joking, the jury was entitled to consider these words as further proof that his claims of innocence were a ruse.

The government introduced proof which the jury could have taken to show that Mascia's apparent reluctance to bribe Ruggiero until late in the meeting of September 18 was based upon his hope that a bribe previously paid to an IRS agent by his Connecticut business partner would also serve to protect him, Mascia, from an additional tax assessment.

The judge's charge on the entrapment issue and as to the government's heavy burden to establish predisposition was unexceptionable. In the light of that charge the jury's finding is clearly supportable.

Appellant contends, however, that regardless of the question of predisposition, the government's conduct during the investigation was so offensive and unconscionable as to require acquittal as a matter of law. In *Sherman* v. *United States,* 356 U.S. 369 (1958), the Supreme Court rejected the view that an entrapment defense is directed to police misconduct rather than to the diminished guilt of the defendant. See also, *Sorrells* v. *United States,* 287 U.S. 435, 451 (1932). As to this issue this court said in *United States* v. *Smalls,* 363 F.2d 417, 419-20 (2d Cir. 1966) that "we are, of course, bound by *Sorrells* and *Sherman.*" See also *United States* v. *Viviano,* 437 F.2d 295, 299, ftn. 4 (2d Cir. 1971).

Affirmed.

Appendix B.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

ANGELO MASCIA,

Defendant.

Before: HON. EDMUND L. PALMIERI,
U. S. D. J.
January 26, 1971

The Court: Mr. Owen, I think you have some motions.

Mr. Owen: I do. I have a motion pending before your Honor for an acquittal notwithstanding the verdict.

The Court: Have you any other motion?

Mr. Owen: I don't believe so, your Honor, no. I think that's the one you—

The Court: Gentlemen, I have considered your briefs at some length and I must confess that this case did not sit well with me when the verdict was returned, and it still causes me a great deal of trouble because of the alternative entrapment ground involving the impermissible use of police power.

I had hoped that Mr. Shaw would have discussed the Morrison case reported at 348 F. 2d 1003 which clearly states that apart from the usual basis of entrapment, inducement and propensity basis, there is an alternative basis, namely, the conduct of the government in promoting the commission of a crime.

Appendix B.

Mr. Shaw, I understand, did not discuss the Morrison case or the cases that speak of that alternative ground because, as I understand it, he relies on the decisions of the Supreme Court in United States against Sorrells and Sherman against the United States in 287 U. S. 436, an old case decided in 1932, and the Sherman case decided in 1958, 356 U. S. 369, in which the majority expressly declined to reconsider the basis for entrapment and to accept as its view the position of the minority as stated in Sorrells.

I must say that I am very deeply impressed by what Mr. Justice Roberts said in the earlier case and by what Mr. Justice Frankfurter said in line with what Judge Roberts said. There is a point beyond which government agents cannot go in securing a conviction for a crime.

I want to say right now that I have no quarrel with the government agent who testified in this case, whose testimony was accepted by the jury and who acted in my opinion in perfect good faith and in accordance with an appropriate set of instructions.

As I understand it, his prime objective was a former revenue agent by the name of Williams, and Mr. Shaw admitted before the jury and in his colloquies with me on this point that the government agent played the game to the hilt, that is, he cooperated with Williams in any way that Williams wanted so that he could make a case against Williams. So far I have no quarrel with that procedure.

But my conscience begins to rebel at the point where the investigation of Williams involved the agent's cooperating with him for the purpose of softening up the defendant so as to make the defendant become amenable to the temptation to participate in a bribe. The conversations that the agent had with Williams before their meetings with the defendant, the conversations they had with the defendant, all add up to one thing, that the government stopped at no statement and at no promise for the purpose of softening up the taxpayer so as to get the tax consultant.

Appendix B.

So far I have no quarrel with the case against the tax consultant. He obviously violated the law, on the face of it, at any rate. He has not been tried yet and I do not want to prejudge his case, but on the face of it there was a clear case of violation of law on the part of the tax consultant, Williams.

But I find considerable difficulty understanding how a conviction can be properly based upon activities which in effect constitutes the overreaching of a defendant by corrupting his advisor, and that is what happened in this case.

The agent led the tax consultant, Williams, to believe that he would do anything to soften up the taxpayer, and indeed he did everything to frighten this taxpayer into being terribly concerned about what would happen if this investigation continued. He used very descriptive phrases, comparing government's audit procedures to an octopus that you chop here and you chop there, but the octopus is still active, and many other phrases which a person who was not as untutored and susceptible as this defendant apparently was would have been impressed by.

I consider, for instance, that if a government agent in the course of his conduct in investigating a case should go so far as to bribe a defense lawyer to corruptly and disloyally deal with his client's case, that that would be an impermissible use of government power.

I do not think anybody can possibly justify a conviction based upon the bribing of a defense counsel. What happened here was only one step removed from that kind of activity. Instead of bribing a defense counsel, a tax consultant, who had pretty much the same relationship to a defendant as an attorney would have, and indeed this agent may have been an attorney, for all I know, but this tax consultant was led to believe that the government agent would help him get a bribe and would share the bribe and

indeed share the bribe, because they met the next day and they split the bribe.

In so far as the tax consultant is concerned, in so far as this evidence would indicate, the government agent corrupted the technical adviser of this taxpayer and led him to believe that the two of them were acting together against the interest of the taxpayer. The situation in my opinion is very comparable to that where a defense counsel is bribed for the purpose of securing a conviction. This does not rest well with me.

As I told the jury when I charged, the defense of entrapment is intended to prevent the overreaching of innocent people. I did not tell them that it was intended to prevent overreaching innocent people where impermissible government conduct was used, even though I was asked by defense counsel to give a charge in that language, because I was unable then and I am unable now to find the standards which make it clear when impermissible government conduct is used.

The Second Circuit in the Morrison case referred to this excessive use of government power as an alternative ground, and later in United States against Smalls, 363 F. 2d 417, decided in 1966 by the Second Circuit, involving an appeal from a judgment of conviction at a trial by another judge of this court without a jury. Judge Feinberg reviewed the status of the entrapment law in this circuit and he said in part, quoting from page 419, 363 F. 2d 417:

> "Finally, appellant claims that the government's conduct in this case in promoting the commission of the crime so violated established standards of fairness that the trial judge should have directed an acquittal as a matter of law. This argument appears to be a plea to redefine entrapment in the terms originally suggested in the concurring opinions (but not accepted by the majority) in Sorrells against the United States and Sherman against the United States"—I am omit-

ting the citations—"as speaking only to the conduct of the police."

There is a reference in the footnote to the American Law Institute, Model Penal Code, Section 2.13(1), proposed official draft of 1962.

Then continuing:

> "We are, of course, bound by Sorrells and Sherman. However, it is true that there have been suggestions in some cases since Sorrells and Sherman that where the actions of the government 'shock the conscience of the court', a conviction cannot be allowed," citing a number of cases, including notably United States against Morrison, which I have already referred to, Whiting against the United States, 321 Fed 2d 72 at 76, a First Circuit case to which I will refer in a minute, and Accardi against the United States, a Fifth Circuit case decided at 257 Fed 2d 168.

Then Judge Feinberg goes on to quote Chief Justice Warren's concurring opinion in Lopez against the United States, 373 U. S. 427, where the Chief Justice says:

> "This Court has not yet established the limits within which the police may use an informant to appeal to friendship and comradarie in crime to induce admissions from a suspect, but suffice it to say here, the issue is substantial. We have already struck down the use of psychological pressures and appeals to friendship to induce admissions or confessions under not totally dissimilar circumstances."

Unfortunately, many of these cases deal with the nefarious narcotics trade and the use of informers in narcotics cases. I say "unfortunately" because it is obvious that the coloration of these opinions must be understood

against the background of a very strong public policy to stamp out this unfortunate trade. Very recently in the United States of America against Sol Cohen, described by the Second Circuit on December 2, 1970, and for which I have only the slip sheet, docket No. 34729, the charge involved the giving of an unlawful payment to an Internal Revenue employee in connection with an audit of income tax returns in violation of 18 U. S. C., Section 2110(f).

The conviction was reversed for a new trial on the ground that the trial court had failed to submit the entrapment defense to the jury.

Here again I searched in vain for some articulation of what impermissible government power amounted to. What were the criteria? What are the standards for the application of such a rule when you charge a case to the jury?

Clearly justice in a criminal law cannot be derived by a jury notion of what is impermissible or not because you would have chaos. As Mr. Justice Frankfurter said in Sherman against the United States at page 385;

> " 'The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention . . . The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from prostitution of the criminal law.' "

These are words which Mr. Justice Frankfurter borrowed from Justice Roberts' language in the Sorrells case. Then he adds in his own terms:

> "Equally important is the consideration that a jury verdict, although it may settle the issue of entrap-

ment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands."

In the Sol Cohen slip sheet, Judge Smith said that it was unnecessary at this time for the court to consider the extent of a defendant's burden in showing inducement or to decide whether "we should abandon the separate elements of the entrapment defense (inducement and propensity) in favor of the unitary approach taken by the United States Court of Appeals for the First Circuit," citing Kadis against the United States, 373 Fed 2d 370 at 373, decided by the First Circuit in 1967.

I looked in vain for some guidance not only in the Kadis case but in the Whiting case, also decided by the First Circuit, and could come up only with the vaguest sort of indication as to what a trial judge with a jury could possibly do with this defense.

In Whiting, 321 Fed 2d 72 at 76, it was held clearly that the offensiveness of government conduct should be decided by the court, and the court went on to say in footnote 12 that it is not necessary to define in other respects what is offensive per se, citing a Yale Law Journal article appearing in 60 Yale Law Journal 1091, entitled "Donnelly, 'Judicial Control of Informants, Spies, Stoolpigeons and Agent Provocateurs.' "

I looked at that article and that too leaves me puzzled because I am again lost in generalities.

Part of the article says that if the officer uses inducements that would reasonably overcome the resistance of one not a chronic offender, such as pleas of desperate illness, continued and persistent coaxing, appeals to

sympathy, pity or friendship, or offers of an inordinate sum of money, the court should find as a matter of law that there was entrapment.

What happened here in my opinion was infinitely worse than any such kind of entreaties because there was a purposeful, direct and I think successful corruption of this defendant's tax adviser.

In Kadis, the most recent pronouncement apparently by the First Circuit, the court went so far as to say, after reviewing several holdings and coming to a conclusion which in effect rejected some previous holdings of that court, quoting from page 374 of 373 Fed. 2d 370:

> "We find, in sum, that consideration of inducement as a separate issue serves no useful purpose, and we believe it to be a mistake. We will no longer bifurcate entrapment into sub-issues of inducement and predisposition but will broaden the departure initiated in Sagansky. Henceforth we will look, singly, at the ultimate question of entrapment."

Parenthetically, that must have been what Judge Smith referred to as the unitary approach. Then going on:

> "If the defendant shows through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government, but such a showing is not made simply by evidence of solicitation. There must be some evidence tending to show unreadiness . . .
>
> "While this conclusion modifies our prior decisions, we do not feel it to be at variance with the position thus far taken by the Supreme Court, which has never distinguished between the issues of inducement and predisposition, nor condemned the act of inducement apart from its effect on an innocent man."

I skip a portion:

> "More recently, in Osborne against the United States, 385 U.S. 323, 1966, in a situation in which inducement, as such, could have raised interesting questions, the court made no mention of it."

After discussing that case the court continues:

> "One question remains: When has the defendant shown 'some evidence' of entrapment, viz. when is the burden placed on the government to show that the defendant was not in fact corrupted by the government agent? The amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal," citing McDonald against the United States, 312 F. 2d 847.
>
> "but it must be more than a mere scintilla. It cannot be enough, for example, where the defendant readily agreed to engage in a criminal act, to show that he enjoys a good reputation. However, any evidence, whether introduced by the defense or by the prosecution, that the government agents went beyond a simple request and pleaded or argued with the defendant should be enough. Evidence that the defendant resisted the criminal suggestion raises the question whether his hesitation exhibited the conscience of the upright or merely the circumspection of the criminal. Evidence that on other occasions the defendant refused to engage in acts similar to those with which he is charged tends to prove that he was not ready and willing, and equally creates a jury issue."

Gentlemen, I am left with the unhappy position of hearing many voices to the effect that there is such a thing as entrapment by way of impermissible government conduct, but I am at a complete loss to define just what that im-

permissible government conduct can be in a given case. I am at a complete loss to define what the criteria should be in charging this matter to a jury.

My own view, for what it is worth, is that this is a matter that should be left to the courts, that as Justice Roberts said:

> "This is a matter that belongs to the court for the preservation of the purity of its own temple."

If I had the authority to do so, I would find that any government conduct causally related to a conviction which involves the corruption of a defense counsel or a person acting in a confidential advisory capacity to a defendant should be condemned and that no conviction resulting therefrom should be upheld.

I do not have the authority to reach any such conclusion because I am bound by the holdings of the Supreme Court in the Sorrells and Sherman cases, I am bound by their silence since the Sherman case on this subject, and I therefore must regard this defendant as having been lawfully convicted.

However, in imposing a penalty, I cannot overlook the fact that even after the sedulous, persuasive, continuous activities of this defendant's tax consultant and the government agent in "softening him up" for the bribe, even then he protested and said it was not the right thing to do, and at one point said that he would rather give up his home and go on relief than get involved in such activity.

It is, of course, true that this defendant did make ugly statements which, taken in isolation, would discredit him and undoubtedly the statements had a good deal to do with the conclusion of the jury in this case; but I respectfully suggest that these statements were obtained from a much imposed-upon, untutored, rough-hewn man, after the confidence and personal relationship which should have existed

between him and his tax consultant had been successfully penetrated by the government.

I think that all of these statements, even if they can be construed prejudicially to the defendant, are not or should not be properly before the court. It is one thing when a believer makes a confession to an ordained priest. It is another thing when he makes his confession to an imposter.

Gentlemen, I have come to the conclusion, somewhat regretfully, that it is my duty, and it would be an excessive use of my authority to do otherwise, to impose sentence upon this defendant because of the binding effect of the Sorrells and Sherman cases. I am disposed to do so at this time.

I assume, Mr. Owen, that you will pursue an appeal diligently in this case.